LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 10 1962
JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962

No. 67

F. L. SHUTTLESWORTH and CHARLES BILLUPS,
Petitioners,

vs.

CITY OF BIRMINGHAM,
Respondent.

BRIEF

On Behalf of Respondent to Petition for Writ of Certiorari.

WATTS E. DAVIS,
WILLIAM C. WALKER,
EARL McBEE,
600 City Hall Building,
Birmingham, Alabama,
Attorneys for Respondent.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-6477.

INDEX.

Page

Statement in opposition to question presented for review 1

Statement in opposition to constitutional and statutory provisions involved 3

Statement in opposition to petitioners' statement of the case 3

Argument:

Re: Lack of jurisdiction of the Court 4

Re: Constitutional and statutory provisions involved 5

Re: Question presented 8

Re: Petitioners' reasons for granting the writ 16

Certificate of service 19

Cases Cited.

Allen-Bradley Local, etc., v. Wisconsin Employment Relations Board, 315 U. S. 740, at page 746, 62 S. Ct. 820, at page 824, 86 L. Ed. 1154 6

Browder v. Gayle, 142 F. Supp. 707 17

Bullock v. U. S., 265 F. 2d 683, cert. denied 79 S. Ct. 1294, 1452, 360 U. S. 909, 932, 3 L. Ed. 2d 1260, rehearing denied 80 S. Ct. 46, 361 U. S. 855, 4 L. Ed. 2d 9 17

Crane v. Pearson, 26 Ala. App. 571, 163 So. 821 6

Davis v. State, 36 Ala. App. 573, 62 So. 2d 224 11

Dudley Brothers Lumber Company v. Long, 109 So. 2d 684, 268 Ala. 565 15

Garner v. State of Louisiana, 82 S. Ct. (1961) . 7, 8, 10, 15, 18
Gibson v. Mississippi, 16 S. Ct. 904, 162 U. S. 565, 40 L. Ed. 1075 7

Holle v. Brooks, 209 Ala. 486, 96 So. 341 6

Jones v. State, 174 Ala. 53, 57 So. 31, 32 11

Local No. 8-6, Oil, Chemical and Atomic Workers International Union, AFL-CIO v. Missouri, 80 S. Ct. 391, 361 U. S. 363, 4 L. Ed. 2d 373 6

Martin v. Struthers, 319 U. S. 147, 63 S. Ct. 862, 87 L. Ed. 1313 17
McNulty v. California, 13 S. Ct. 959, 149 U. S. 645, 37 L. Ed. 882 6

National Labor Relations Board v. Fansteel Metallurgical Corp., 306 U. S. 240 ..... 10, 14

Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292, 302, 57 S. Ct. 724, 729, 81 L. Ed. 1093 ..... 7, 8
O'Neil v. Vermont, 12 S. Ct. 693, 144 U. S. 323, 36 L. Ed. 450 ..... 6, 7

Parsons v. State, 33 Ala. App. 309, 33 So. 2d 164 11
Pruett v. State, 33 Ala. App. 491, 35 So. 2d 115 11

Schenck v. United States, 249 U. S. 47 ..... 16, 18
Swinea v. Florence, 28 Ala. App. 332, 183 So. 686 6

Thompson v. City of Louisville, 80 S. Ct. 624, 625 (1960) 13, 15
Thorington v. Montgomery, 13 S. Ct. 394, 147 U. S. 490, 37 L. Ed. 252 6

Williams v. Howard Johnson, 268 F. 2d 845 17

Statutes and Rules Cited.

Alabama Supreme Court Rule 1, Code of Alabama (1940), Title 7, Appendix 6

City Code of Birmingham (1944):
Section 369 ..... 3, 5, 13
Section 824 ..... 10, 11, 13
Section 1436 ..... 10, 11
Code of Alabama (1940), Title 7, Section 225 7
Code of Alabama (1940), Title 14, Section 14 11
Supreme Court Rule 21 (1), 28 U. S. C. A. 4
Supreme Court Rule 24 (2), 28 U. S. C. A. 5
Supreme Court Rule 33 (1), 28 U. S. C. A. 4, 5

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 721.

F. L. SHUTTLESWORTH and CHARLES BILLUPS,
Petitioners,

vs.

CITY OF BIRMINGHAM,
Respondent.

BRIEF

On Behalf of Respondent to Petition for Writ of Certiorari.

STATEMENT IN OPPOSITION TO QUESTION PRESENTED FOR REVIEW.

Petitioners present a single question for the review of this Court (p. 2).*

* Page references contained herein and preceded by the letter "p" designate pages in petitioners' Petitions for Writ of Certiorari. Page references contained herein and preceded by the letter "R" refer to pages in the *Records* of the proceedings below, which Records have common page numbers.

This question is predicated upon the supposition that "Alabama has convicted petitioners" of inciting or aiding or abetting another to go or remain on the premises of another after being warned not to do so.

Petitioners then propose for review by the Court the question of whether, in convicting and sentencing the petitioners, "has Alabama denied liberty, including free speech, secured by the due process clause of the Fourteenth Amendment?"

The State of Alabama is not a named party in the case, and so far as City of Birmingham, the respondent named in this cause, is aware, no effort has been exerted at any time to make the State of Alabama a party. Since "Alabama" was not a party to the case below, and is not a named party before this Court, the sole question presented here for review seems entirely and completely **moot** and **ungermane**, leaving thereby no question related to any events taking place in the courts below for review by this Court. The case below was a quasi-criminal proceeding wherein the City of Birmingham sought to enforce one of its local ordinances.

Petitioners take occasion to also predicate their question presented for review (p. 2) upon the hypothesis that "a Birmingham ordinance requires racial segregation in restaurants."

The petitioners' reference to such an alleged ordinance is mentioned here before this Court for the **very first time** since the initial filing of the complaint by respondent in the county circuit court below, and is not an appropriate matter to be considered here under a petition seeking writ of certiorari.

STATEMENT IN OPPOSITION TO CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Petitioners contend that a section 369 of the 1944 General Code of City of Birmingham is one of three ordinances involved in this proceeding.

As mentioned above, this alleged ordinance has been injected into this case for its first and only time in the petition for writ now before this Court, and is not a proper subject for consideration by the Court. The petition for writ of certiorari should seek only a review of what has transpired below and is not properly an arena for introducing new defenses which were not exhausted in the state courts.

STATEMENT IN OPPOSITION TO PETITIONERS' STATEMENT OF THE CASE.

Respondent wishes to supplement petitioners' statement of the case by pointing out to the Court additional pertinent testimony which, though brief, is not in petitioners' statement:

> ". . . Rev. Billups came to his school, Daniel Payne College, in a car and carried him (Davis) to Rev. Shuttlesworth's house" (R. 28).

The record further shows "that in response to Rev. Shuttlesworth asking for volunteers to participate in the sit down strikes that he (Davis) volunteered to go to Pizitz at 10:30 and take part in the sit down demonstrations" (R. 29).

As noted by petitioners, Billups was present at the meeting and others in attendance at the meeting at Rev. Shuttlesworth's house participated in sit down demonstrations the day following the meeting (p. 4).

ARGUMENT.

Re: Lack of Jurisdiction of the Court.

Respondent insists the Court is without jurisdiction to entertain the "petition for writ of certiorari" in this cause, for that the petition was not served upon either of the counsel of record for respondent, namely, Watts E. Davis or Bill Walker, later referred to as William C. Walker, whose names clearly appear upon the face of the title pages appearing in each of the respective records now before the Court in this cause as the only counsel of record.

These two cases below, before the Alabama Court of Appeals, are reported respectively in 134 So. 2d 213 and 134 So. 2d 215; and, before the Supreme Court of Alabama, in 134 So. 2d 214 and 134 So. 2d 215. Each of the four reported cases show "Watts E. Davis and William C. Walker for Appellee".

The proof of service, Form 75 (8-61-10M), as supplied by the Clerk and subsequently filed with the Clerk of this Court, demonstrates clearly that notice of the filing of the petition, the record and proceedings and opinion of the Court of Appeals of Alabama and of the Supreme Court of Alabama, was served upon "Hon. MacDonald Gallion, Mr. James M. Breckenridge". Service of the notice, which is required by **Supreme Court Rule 21 (1)**, 28 U. S. C. A.,[1] to be made as required by **Supreme Court Rule 33 (1)**, 28 U. S. C. A.,[2] was attempted to be accomplished by use of

[1] The pertinent provision of Supreme Court Rule 21 (1) reads, "Review on writ of certiorari shall be sought by filing with the clerk, with proof of service as required by Rule 33, forty printed copies of a petition. . . ."

[2] The pertinent provision of Supreme Court Rule 33 reads, "Whenever any pleading, motion, notice, brief or other document is required by these rules to be served, such service may be made per-

the mail. **Supreme Court Rule 33 (1)**, 28 U. S. C. A., requires that **service by mail shall be addressed to counsel of record** (emphasis supplied) at his postoffice address, which, as shown supra, was not done in this case.

It is your respondent's position that the petitioners' failure to comply with the reasonable rules of this Court in the above regard, whether done through carelessness or indifference to the rules of this Court, leaves the respondent without notice of the proceedings pending in this cause, as required by law, and that the Court is without jurisdiction to proceed without the necessary parties to the writ before the Court. The petition for writ seeking certiorari should therefore be dismissed or denied.

The rules of this Court, **Supreme Court Rule 24 (2)**,[3] 28 U. S. C. A., do not provide for a separate motion to dismiss a petition for writ of certiorari, and absent the remedy of any such motion, respondent prays that nothing contained in its reply brief shall be considered as a waiver of its objection presented here to the **jurisdiction of the Court**.

ARGUMENT.

Re: Constitutional and Statutory Provisions Involved.

It is contended by petitioners that "Section 369 (1944)" of the respondent's city code is involved in the case now before the Court.

---

sonally or by mail on each adverse party. If personal, it shall consist of delivery, at the office of counsel of record, to counsel or a clerk therein. If by mail, it shall consist of depositing the same in a United States post office or mail box, with first class postage prepaid, addressed to counsel of record at his post office address

[3] "No motion by a respondent to dismiss a petition for writ of certiorari will be received. Objections to the jurisdiction of the court to grant writs of certiorari may be included in briefs in opposition to petitions therefor."

Petitioners contend that the ordinance requires the separation of white and colored persons in eating establishments.

Assuming such to be true, the propriety of suggesting the ordinance for the **first time** in this Court is completely out of harmony with past decisions of this Court. In the case of **Local No. 8-6, Oil, Chemical and Atomic Workers International Union, AFL-CIO v. Missouri,** 80 S. Ct. 391, 361 U. S. 363, 4 L. Ed. 2d 373, this Court said, "Constitutional questions will not be dealt with abstractly. * * * They will be dealt with only as they are appropriately raised upon a record before us. * * * Nor will we assume in advance that a State will so construe its law as to bring it into conflict with the federal Constitution or an act of Congress." The foregoing quote was adopted from the earlier case decided by this Court in **Allen-Bradley Local, etc. v. Wisconsin Employment Relations Board,** 315 U. S. 740, at page 746, 62 S. Ct. 820, at page 824, 86 L. Ed. 1154.

It has been stated under **Alabama Supreme Court Rule 1, Code of Alabama (1940), Title 7, Appendix,** in assigning error on appeal, "it shall be sufficient to state concisely, in writing, in what the error consists".

It has been uniformly held under Alabama Supreme Court decisions that "no question is reserved for decision which is not embraced in a due assignment of error". **Holle v. Brooks,** 209 Ala. 486, 96 So. 341; **Swinea v. Florence,** 28 Ala. App. 332, 183 So. 686; **Crane v. Pearson,** 26 Ala. App. 571, 163 So. 821.

This Court has many times repeated its established doctrine that, "A decision of a state court resting on grounds of state procedure does not present a federal question." **Thorington v. Montgomery,** 13 S. Ct. 394, 147 U. S. 490, 37 L. Ed. 252; **McNulty v. California,** 13 S. Ct. 959, 149 U. S. 645, 37 L. Ed. 882; **O'Neil v. Vermont,** 12 S. Ct.

693, 144 U. S. 323, 36 L. Ed. 450; **Gibson v. Mississippi**, 16 S. Ct. 904, 162 U. S. 565, 40 L. Ed. 1075.

The records before this Court clearly show that petitioners have never placed before the **state courts** the matter of any such ordinance requiring separation of the races although lengthy and detailed pleadings were interspersed throughout all of the student sit-in cases (**Gober et al.**, now here in No. 694), as well as the instant case.

At best, as argued in the **Gober** case, the question of judicial notice by the court below might conceivably find its way into the controversy.

Bearing in mind that **judicial notice is a rule of evidence** rather than a **rule of pleading**, the suggested ordinance, to have served some defensive purpose (see **Code of Alabama (1940), Title 7, Section 225**), would of necessity have had to be incorporated into a plea or answer to the complaint. If then, after the supposed ordinance was properly made an issue in the trial below petitioners sought judicial notice by the Court, rules of **evidence** making it unnecessary to prove by evidence the existence of such an ordinance would have been entirely applicable. The record before the Court clearly demonstrates, of course, that petitioners did not place the question of such ordinance before the lower court, nor was any **assignment of error** directed to the proposition before the state appellate court.

This question is not a new one for this Court. In the recent case of **Garner v. State of Louisiana**, 82 S. Ct. (1961), Mr. Chief Justice Warren, in delivering this Court's opinion, stated, "There is nothing in the records to indicate that the trial judge did in fact take judicial notice of anything. To extend the doctrine of judicial notice to the length pressed by respondent * * * would be 'to turn the doctrine into a pretext for dispensing with a trial' ", citing **Ohio Bell Telephone Co. v. Public Utilities**

Commission, 301 U. S. 292, 302; 57 S. Ct. 724, 729, 81 L. Ed. 1093. The foregoing opinion further recited the inherent danger of a court taking upon itself the prerogative of unsolicited judicial notice in the absence of inserting same into the record by saying a party, "* * * is deprived of an opportunity to challenge the deductions drawn from such notice or to dispute the notoriety or truth of the facts allegedly relied upon."

In light of the **Garner opinion**, supra, and in light of the fact that the record discloses nowhere that the court below, either upon solicitation of counsel or otherwise, took or refused to take judicial notice of any such ordinance, and further, that no assignment of error before the state appellate court makes any reference whatever to the existence of such an ordinance, thereby affording the state appellate court an opportunity to rule on any question related to the ordinance, your respondent respectfully urges that no constitutional or other questions dependent upon such an ordinance are properly presentable before this Court for review.

ARGUMENT.

Re: Question Presented.

Petitioners submit one question for review (p. 2) by this Court.

The question is predicated upon the assumption of fact that "Alabama has convicted petitioners" for inciting, aiding or abetting another person to remain upon the premises of another after being warned not to do so; and upon the further assumption of fact that there was no evidence that either of the petitioners "persuaded anyone to violate any law" (ibid).

Following the foregoing assumptions of fact, petitioners present for review the following question:

> "In convicting and sentencing petitioners respectively to 180 and 30 days hard labor, plus fines, has Alabama denied liberty, including freedom of speech, secured by the due process clause of the Fourteenth Amendment?"

The City of Birmingham was the plaintiff in the trial court below (R. 2). The City handled the prosecution of the petitioners in the trial court and represented the city in the appellate courts of Alabama. So far as the record discloses, and so far as the respondent is aware, the State of Alabama has never been a party to any phase of this proceeding nor has the State of Alabama at any time interceded in the matter in any manner disclosed by the record. It would therefore appear that the only question presented to this Court for review is a moot one.

As to the proposition that there was "no evidence" (p. 2) to support the conviction of petitioners, your respondent is unwilling to concede this to be true.

The testimony offered by respondents in the trial below was neither disputed by petitioners nor was same subjected to any cross-examination (R. 31).

Petitioners present extracts of the testimony below in Appendix to their petition (pp. 13a-16a). In brief, the evidence is shown to be as follows: A student (Golber) went to Rev. Shuttlesworth's house on March 30th (p. 13a); a student (Davis) went to the house with Rev. Billups, who came to his school in a car and carried him there (p. 15a); Rev. Shuttlesworth and Rev. Billups were both present at Rev. Shuttlesworth's house (p. 14a); that there was a meeting in the living room and that Rev. Shuttlesworth participated in the discussion about sit-down demonstrations and Rev. Billups was at this meeting also (ibid); that when the student (Davis) arrived at the meeting there were several people there including

Rev. Shuttlesworth and a number of other students (p. 15a); Rev. Shuttlesworth asked for volunteers to participate in the sit-down strikes (ibid); a student (Davis) volunteered to go to Pizitz (a department store in the City of Birmingham) at 10:30 and take part in the sit-down demonstrations (ibid); that Rev. Shuttlesworth announced at that time that he would get them out of jail (pp. 15a, 16a); both James Albert Davis and James Gober did participate in sit-down demonstrations on March 31, 1960, as well as other students who attended the meeting at Rev. Shuttlesworth's house on March 30, 1960 (p. 16a).

The foregoing is the evidence contained in the record before the Alabama Court of Appeals, and in the petition under consideration.

The opinion of the state court of appeals (pp. 1a, 2a) stated (p. 2a), "A sit-down demonstration being a form of trespass after warning, denotes a violation of both State law and especially of Section 1436 of the City Code, supra. * * * There is a great deal of analogy to the sit-down strikes in the automobile industry referred to in **National Labor Relations Board v. Fansteel Metallurgical Corp.**, 306 U. S. 240."

Mr. Chief Justice Warren, in the Court's opinion in **Garner v. State of Louisiana**, 82 S. Ct. 248, 253 (1961), stated, "We of course are bound by a state's interpretation of its own statute and will not substitute our judgment for that of the state's when it becomes necessary to analyze the evidence for the purpose of determining whether that evidence supports the findings of a state court."

The gravamen of the offense (City Code, Section 824) charged against petitioners was that petitioners incited, aided or abetted another to violate the city law or ordinance. The law or ordinance which petitioners were

charged with inciting another to violate was Section 1436 of the City Code, which latter section makes it unlawful to remain on the premises of another after warning not to do so.

The evident objective of Section 824 of the City Code was the curtailment of City law violations by making it unlawful to incite or assist others to violate city laws.

While there has been no occasion for the Alabama appellate courts to interpret Section 824 of the City's Code, a very similar state statute, **Section 14 of Title 14, Code of Alabama, 1940,** contains an aiding and abetting statute very similar to the city's law, which says in part as follows: "* * * And all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense, **or aid or abet** (emphasis supplied) its commission, though not present, must hereafter be indicted, tried and punished as principals, as in the case of misdemeanors."

The foregoing state statute has been construed by the state courts on many occasions. **Davis v. State,** 36 Ala. App. 573, 62 So. 2d 224, states, "The words 'aid and abet' comprehend all assistance rendered by acts or words of encouragement or support. . . . **Nor is it necessary to show prearrangement to do the specific wrong complained of.**" (Emphasis supplied.)

In **Pruett v. State,** 33 Ala. App. 491, 35 So. 2d 115, the court said, "Aid and abet comprehend all assistance rendered by acts or words of encouragement * * *", citing **Jones v. State,** 174 Ala. 53, 57 So. 31, 32.

Alabama has further ruled, "The participation in a crime and the community of purpose of the perpetrators need not be proved by direct or positive testimony, but may be inferred from circumstantial evidence." **Parsons v. State,** 33 Ala. App. 309, 33 So. 2d 164.

While the state statute differs from the city law primarily in the fact that the word "incite" is not found in the state statute, the net effect of the inclusion of the word "incite" in the city law could do no less than strengthen and enlarge the scope of the city's law.

The salient features of the state decisions, supra, are that **acts or words of encouragement** are sufficient to bring an offender within the scope of the statute; that it is not necessary to show prearrangement to do the **specific wrong complained of**; and that the community of purpose may be inferred from **circumstantial evidence.**

As to whether there is **any** evidence in the record to disclose that petitioners did incite or aid others to violate a city law, the petition admits in a summary of the evidence (p. 4), and in appendix (p. 14a), that a meeting was held at the home of Rev. Shuttlesworth; that Rev. Billups had driven one student to the meeting and was present during the meeting (p. 15a), at which meeting other students were in attendance, and that after one student volunteered to go to Pizitz at a certain hour, a list was made (ibid). The sit-downs were discussed at the meeting (p. 14a); Rev. Shuttlesworth made the announcement "that he would get them out of jail" (p. 16a), and that other students at the meeting participated in the sit-downs (ibid).

It is most difficult in view of the foregoing evidence to agree with petitioners' predicate of fact, upon which they base their one question for review by this Court (p. 2), namely, that there was "no evidence" upon which to rest the convictions of the petitioners in the trial court below. Every conceivable element of the offense of **inciting** the students to go upon the premises of another and participate in sit-downs is established by the evidence as admitted in the petition (supra) and as shown in the record. The sit-downs were prearranged, volunteers were sought, and the volunteers were promised they would be released

from jail. No other rational inference could be drawn from the promise of **release from jail** than that the volunteers were to continue their sit-downs on the premises of others until they were arrested for trespass, for under the respondent's general City Code there was no other punitive provision in the code under which they could be arrested and jailed. Petitioners assert the respondent has a segregation ordinance, which is copied into their petition as Section 369 (144) (p. 3), which has already been discussed here at length, which petitioners say requires restaurant owners or operators to make certain provisions for separation of the races in their eating establishments. Certainly the students could not have been arrested under any such ordinance as this, for, as shown in the petition (ibid), it only proposes a burden upon the person who **"conducts"** the restaurant and imposes no sanction or penalty upon would be customers in the eating establishments. There is no evidence in the record that the students were boisterous or obtrusive in their conduct so as to create a breach of the peace.

The solicitation of Rev. Shuttlesworth for volunteers for the sit-downs and the promise to get them out of jail (supra) left the state court no alternate but to reasonably conclude from the evidence that the sit-down demonstrators were to trespass and be arrested.

In **Thompson v. City of Louisville**, 80 S. Ct. 624, 625 (1960), cited by petitioners, this Court said, "Decision on this question turns not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all."

In view of the evidence above outlined, the attempt by petitioners to parallel the instant case with the **Thompson case**, supra, appears highly incongruous.

It must also be remembered that the same trial court which rendered judgment against these two petitioners had

before it for consideration and the rendition of judgment, ten cases involving trespasses committed by the sit-down demonstrators who were counseled by Rev. Shuttlesworth, all of whom were sentenced together with these petitioners in a common sentencing proceeding (R. 35-39). The ten cases (**Gober et al.**, now here in No. 694), involving trespass after warning, together with the two instant cases, all involved common counsel and developed out of near identical circumstances occurring in different stores. If, indeed, the trial court had no knowledge or concept of the meaning of the term "sit-down demonstration", after having just completed hearing ten cases involving nothing but "sit-down" cases, it would of necessity have to be assumed that the trial judge was something more than naive. In context with the promised release from jail (pp. 4, 15a, 16a), there was only one inescapable interpretation which the trial court could place upon the term "sit-down demonstrations" and that was—a device of remaining on another's premises after being told to leave, as in **Fansteel**, supra.

Not to be overlooked is the matter of **how the question of the sufficiency of the evidence was raised in the state court.** Petitioners' motion to exclude the evidence, ground No. 4 (R. 6), in attacking the sufficiency of the evidence, alleged as follows:

> "4. The evidence against the defendant, a Negro, in support of the charge of his violation of 824 the General City Code of Birmingham of 1944, **clearly indicates** (emphasis supplied) that those persons alleged to have acted as a result of the aiding and abetting of the defendant, had accepted an invitation to enter and purchase articles in the various department stores in the City of Birmingham, stores open to the public, but had not been allowed to obtain food service on the same basis as that offered white persons, be-

> cause of their race or color; and, that in furtherance of this racially discriminatory practice of the **various department stores** (emphasis supplied) in the City of Birmingham, the defendant was arrested. * * *"

In the foregoing motion to exclude the evidence (R. 6), which motion is not reviewable by the state appellate court, **Dudley Brothers Lumber Company v. Long,** 109 So. 2d 684, 268 Ala. 565, the petitioners themselves have interpreted the evidence in the trial below as being inclusive of the activities of the demonstrators in the department stores, in adopting the language (R. 6), "The evidence against the defendant(s), a Negro, in support of the charge of violation of 824 the General City Code of Birmingham of 1944, **clearly indicates** (emphasis supplied) that those persons alleged to have acted as a result of the aiding and abetting of the defendant(s) had accepted an invitation to enter and purchase articles in the various department stores * * *", etc., and proceeds then to state that because of the discrimination of the **"various department stores"** the defendants were subsequently arrested (ibid).

In conclusion, on the subject of whether there was "any evidence", **Garner** and **Thompson, supra,** to support the state court's finding of guilt, your respondent strongly urges that every element of the offense of violating Section 824 of the General City Code of Birmingham of 1944 has been more than adequately substantiated by the evidence presented below as shown in the record and petition. To hold that there was **no evidence,** as contended by petitioners, to support the conviction would, as stated by Mr. Justice Harlan in **Garner v. State of Louisiana,** 82 S. Ct. 248, 265, "* * * in effect attribute(s) to the (Louisiana) Supreme Court a deliberately unconstitutional decision * * *".

ARGUMENT.

Re: Petitioners' Reasons for Granting the Writ.

Petitioners' argument concerning reasons for granting the writ should, of course, be confined to their "Question Presented" (p. 2) for the review of the Court, the substance of which is, "* * * has Alabama denied liberty, including freedom of speech, secured by the due process clause of the Fourteenth Amendment?"

For very obvious reasons, petitioners have not elaborated upon the **rights of property owners** as guaranteed under the Fifth and Fourteenth Amendments to the Constitution.

Petitioners concede that the doctrine of free speech protection has many limitations and cite well known authority in support thereof (p. 7), perhaps the most famous of which is **Schenck v. United States**, 249 U. S. 47. As the Court well knows, the defendant in this case was convicted for mailing circulars during World War I, which circulars were found to be detrimental to this country's war effort. On the circular, among other things, were the words, "Assert Your Rights", and described arguments in support of the war effort "as coming from cunning politicians." The right of free speech was not upheld by this Court because a danger to the substantive rights of others was involved.

In the instant cases, petitioners claim they were asserting their rights in seeking volunteers to test the substantive rights of private property owners, or, as they express it, to perform "sit-down demonstrations" (p. 8), which are commonly known to be a sitting upon the premises of another and refusing to leave until they become trespassers and are arrested. Rev. Shuttles-

worth's promise to free the demonstrators from jail conclusively establishes this fact. Attention is also invited to this fact as borne out in the ten cases involving the demonstrators now here in **Gober, et al.**, before the Court under No. 694. The demonstrators in **Gober** (Parker, R. 21; West, R. 18) said "they were not going to leave"; a demonstrator (Gober, R. 39; Davis, R. 40) was quoted as saying "they were instructed to go into the store and sit down at a white lunch counter, and that they would probably be or would be asked to leave, and not to leave but remain there until the police arrested them and took them out"; an assistant store manager (Parker, R. 23; West, R. 20) quoted demonstrators as saying, "We have our rights," when told to leave.

The inciting of this type of demeanor is what petitioners refer to as "constitutionally protected free expression" (p. 10).

This Court made it clear in **Martin v. Struthers**, 319 U. S. 147, 63 S. Ct. 862, 87 L. Ed. 1313, that, "Traditionally the American law punishes persons who enter onto the property of another after having been warned to keep off."

In **Browder v. Gayle**, 142 F. Supp. 707, it is clearly stated that individuals may elect persons with whom they will do business unimpaired by the Fourteenth Amendment.

The case of **Williams v. Howard Johnson**, 268 F. 2d 845, states clearly that restaurants not involved in interstate commerce are "at liberty to deal only with such persons as it may elect."

In the case of **Bullock v. U. S.**, 265 F. 2d 683; **cert. denied** 79 S. Ct. 1294, 1452, 360 U. S. 909, 932, 3 L. Ed. 2d 1260; **rehearing denied**, 80 S. Ct. 46, 361 U. S. 855, 4 L. Ed. 2d 95, it was emphasized that, "The right of free speech is not absolute and **this amendment to the Federal Constitution**

does not confer the right to persuade others to violate the law." (Emphasis supplied.)

The evident intent in the meeting sponsored and participated in by Rev. Billups and Rev. Shuttlesworth was to determine whether private ownership and control of property was to endure in this country or whether the power of a large minority political block could overrule this traditional heritage of a free enterprise system.

Protection of one's property under the Fifth and Fourteenth Amendments are "**substantive**" rights and any threat to this substantive right presents a "clear and present danger." **Schenck v. United States**, supra.

Whatever may or may not be morally right in the use of one's own property, sit-down demonstrations have no place there if not consented to by the owner, as stated in **Garner**, supra, in the opinion delivered by Mr. Justice Harlan; and whether the act involves racial intolerance, prejudice or bias is not of concern under the Fourteenth Amendment, where the property is private. See Mr. Justice Douglas' concurring opinion in **Garner**, supra.

In conclusion, and for the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

WATTS E. DAVIS,

WILLIAM C. WALKER,

EARL McBEE,
900 City Hall Building,
Birmingham, Alabama,
Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

F. L. SHUTTLESWORTH and CHARLES BILLUPS,

Petitioners,

vs.

No. 721.

CITY OF BIRMINGHAM,

Respondent.

Certificate of Service.

I, Earl McBee, one of the Attorneys for Respondent, City of Birmingham, and a member of the Bar of The Supreme Court of the United States, hereby certify that on the ..... day of March, 1962, I served a copy of Brief on behalf of respondent to Petition for Writ of Certiorari, in the above styled and numbered cause, on Jack Greenberg and on Constance Baker Motley, Attorneys for Petitioners, by depositing the same in a United States Post Office or mail box, with air mail postage prepaid, addressed to them at their post office address, namely, 10 Columbus Circle, New York 19, New York; and on the following respective Attorneys of Record for Petitioners whose addresses are known to Respondent by depositing the same in a United States Post Office or mail box, with first class postage prepaid, addressed to Arthur D. Shores, 1527 5th Avenue, North, Birmingham, Alabama; Orzell Billingsley, Jr., 1630 4th Avenue, North, Birmingham, Alabama; Peter A. Hall, Masonic Temple Building, Birmingham, Alabama; Oscar W. Adams, Jr., 1630 4th Avenue, North, Birmingham, Alabama; and J. Richmond Pearson, 415 North 16th Street, Birmingham, Alabama.

.....

Earl McBee,

Attorney for Respondent.